STATE OF MICHIGAN

COURT OF APPEALS

INA JOHNSON, Next Friend of ALEXES JOHNSON, Minor,

Plaintiff-Appellant,

v

FARMER JACK, a/k/a BORMAN'S, INC., and GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Defendants-Cross Plaintiffs,

and

A & B REFRIGERATION COMPANY,

Defendant-Cross Defendant-Appellee.

UNPUBLISHED
May 3, 2002

No. 226429
Wayne Circuit Court
LC No. 96-691446-NO

Before: Whitbeck, C.J., and Markey and Kelly, JJ.

PER CURIAM.

In this slip and fall negligence action, plaintiff appeals as of right, challenging the trial court's decision to direct a verdict in favor of defendant A & B Refrigeration Company (hereinafter "A & B"). We affirm.

I. Basic Facts and Procedural History

Plaintiff's eight-year-old daughter slipped and fell on pool of water that accumulated on defendant Farmer Jack's floor, sustaining serious injuries. The water came from a leaking freezer case. Plaintiff, on behalf of the minor child, filed suit against defendant Farmer Jack. When Farmer Jack filed a notice of non-party fault, plaintiff amended her complaint and included A & B because it had a contract with Farmer Jack obligating it to maintain and repair its freezer cases. Farmer Jack also filed a cross-claim against A & B.

The case proceeded through trial against both Farmer Jack and A & B. The trial court directed a verdict in A & B's favor and the jury absolved defendant Farmer Jack of liability,

determining that its agents were not negligent. The trial court denied plaintiff's motion for a new trial.

II. Standard of Review and Legal Test

This Court reviews a trial court's decision on a motion for directed verdict de novo. *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 71; 600 NW2d 348 (1999). All the evidence presented up to the time of the motion must be examined in a light most favorable to the nonmoving party to determine whether a question of fact existed. See *Matras v Amoco Oil Co*, 424 Mich 675, 681-682; 385 NW2d 586 (1986); *Candelaria*, *supra* at 71-72. "A directed verdict is appropriate only when no material factual question exists upon which reasonable minds could differ." *Candelaria*, *supra* at 71-72.

III. Analysis

To establish a prima facie case of negligence, a plaintiff must establish that the defendant owed a duty to the plaintiff, the defendant breached that duty, the defendant's breach was a proximate cause of the plaintiff's injuries, and the plaintiff suffered damages. *Phillips v Deihm*, 213 Mich App 389, 397; 541 NW2d 566 (1995). Under principles of premises liability, the right to recover requires that the defendant had legal possession and control of the premises. *Morrow v Boldt*, 203 Mich App 324, 328; 512 NW2d 83 (1994).

Plaintiff argues that her daughter was an intended beneficiary of the service agreement between A & B and defendant Farmer Jack and, therefore, A & B owed her a duty of care. We disagree. The existence of a duty is a question of law for the court. *Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 707; 597 NW2d 506 (1999); *Etter v Michigan Bell Telephone Co*, 179 Mich App 551, 555; 446 NW2d 500 (1989). "In determining whether to impose a duty, this Court evaluates factors such as: the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of risk presented." *Foster*, *supra* at 707, quoting *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). A & B's contract with Farmer Jack consisted only of a list of rates and an indemnity agreement. Even viewed in the light most favorable to plaintiff, it does not support the conclusion that A & B either agreed to assume Farmer Jack's obligation to keep the premises in a safe condition or that A & B intended or agreed to benefit Farmer Jack's customers by the performance of its contractual duties. See *Smith v Allendale Mut Ins Co*, 410 Mich 685, 716-717; 303 NW2d 702 (1981). Unlike the situations presented in the cases cited by plaintiff, A & B did not owe a duty of care arising under the contract. See *Courtright v Design Irrigation, Inc*, 210 Mich App 528, 529-532; 534 NW2d 181 (1995); *Osman v Summer Green Lawn care, Inc*, 209 Mich App 703, 708-710; 532 NW2d 186 (1995), overruled in part on other grounds in *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999); *Talucci v Archambault*, 20 Mich App 153, 161; 173 NW2d 740 (1969).

In this case, there was no relationship between plaintiff and A & B. Additionally, the risk of slipping on a puddle of water on the floor and falling, was a risk for which A & B could not control. Consequently, A & B could not prevent the harm. Thus, even drawing all reasonable inferences in plaintiff's favor, we conclude that the trial court correctly found that A & B did not owe plaintiff a common law duty of care. See *Foster*, *supra* at 707.

Furthermore, while our determination that A & B did not owe a duty of care effectively disposes of the need to consider plaintiff's remaining arguments, we also agree that, even assuming the existence of a duty, the evidence failed to show that A & B was negligent in carrying out its duties under the contract, thereby proximately causing the injuries to plaintiff's daughter.

At trial, witnesses speculated that Farmer Jack may not have authorized the repair immediately, or that A & B may have had a problem finding the right motor for the blower. These explanations, even when viewed in plaintiff's favor, do not tend to show that A & B acted unreasonably. Plaintiff failed to present any evidence from which reasonable minds could conclude that the delay was due to A & B's negligence. We likewise agree with the trial court that, with regard to the issue of proximate cause, the evidence did not support a finding that plaintiff's daughter fell because A & B delayed in performing the repair. Rather, plaintiff fell because during that delay, Farmer Jack (who had exclusive possession and control of the premises) allegedly failed to properly maintain the floor in a dry condition. See *Weymers v Khera*, 454 Mich 639, 647-648; 563 NW2d 647 (1997).

Accordingly, the trial court did not err in granting A & B's motion for a directed verdict.

Affirmed.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly